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No. 79-1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,

Petitioner

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein; UNITED STATES OF AMERICA; the BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; et al.,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

This reply brief by petitioner The Metropolitan School District of Perry Township, Marion County, Indiana (hereinafter called "Perry"), is addressed to arguments first raised in the briefs in opposition filed by respondents

Buckley, The Board of School Commissioners of the City of Indianapolis, Indiana (hereinafter called the "Indianapolis Public Schools" or "IPS"), and the United States of America. The common theme of the three briefs is that Perry's petition for certiorari does not challenge the correctness of the constitutional standards applied by the courts below but seeks no more than to have this Court review concurrent findings of fact by the two courts below. Nothing could be further from the truth. Of the three questions presented for review by Perry's petition, only the first question challenges the sufficiency of the record evidence to sustain the findings made, and a very obvious and exceptional showing of error can be made. On the other hand, the second and third questions stated challenge the constitutional standards applied by the courts below in imposing an interdistrict remedy as a cure for a single district *de jure* segregation problem.

That an interdistrict remedy is not warranted in this case is clear from *Milliken v. Bradley*, 418 U.S. 717 (1974). In the opening paragraph of the Court's opinion in that case it was said:

> "We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single district de jure segregation problem [1] absent any finding that the other included school districts have failed to operate unitary school systems within their districts, [2] absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, [3] absent any finding that the included districts committed acts which effected segregation within the other districts, and [4] absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multi-district remedy or on the question of constitutional violations by those neighboring districts." (Bracketed numerals supplied) (418 U.S. at 721-22)

Of the missing factors noted by the Court in *Milliken*, only factor [4], procedural due process, has been supplied in the case at bar. The three substantive factors are also absent here.

With respect to factor [1], the district court in its 1979 opinion stated that "there is no evidence that any [suburban school district] has operated anything other than a unitary school system." (Joint Appendix, p. A114)

With respect to factor [2], there could be no finding that the boundary lines of Perry and the other Marion County school districts were originally established with the purpose of fostering racial segregation in the public schools. The School Corporation Reorganization Act of 1959, IC 20-4-1, pursuant to which the eleven Marion County school corporations were created and their boundaries fixed, was not one of the statutes attacked in the amended complaint of respondents Buckley as unconstitutional. Nor did respondents Buckley make an attack on the validity of the proceedings by which the Marion County school corporations were created under the said statute. Respondents Buckley conceded that the Marion County school corporations were validly created pursuant to a valid statute.

The claim of respondent IPS that *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd* 423 U.S. 963 (1975), presented "an almost identical situation" is without merit. (Brief, pp. 20-21) In *Evans* a three-judge district court held that the provisions of the Delaware Educational Advancement Act of 1968 excluding the Wilmington school district from eligibility for consolidation were unconstitutional. This Court summarily affirmed. The comparable Indiana legislation is The School Corporation Reorganization Act of 1959, IC 20-4-1, which contained no such exception to its applicability. Both the district court and the court of appeals, in denying motions to convene a three-judge court in the case at bar, have held that the

constitutionality of the Indiana school reorganization statute is not involved in this case.

Nor is this a case like *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972), and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972), where it was attempted to create new school districts out of portions of *de jure* segregated school districts that had not yet completed desegregation. The suburban school districts involved in the case at bar, and their predecessors, have never been a part of the IPS district, or its predecessors. The township school districts in Marion County have been in existence as long as the IPS district, *i.e.*, since 1852.

The majority of the court of appeals held that this case fits squarely within the rule of *Milliken* that an interdistrict remedy is appropriate "where district lines have been drawn on the basis of race." (Joint Appendix, p. A21) On the other hand, Circuit Judge Tone, in his 1975 dissenting opinion, observed that "[f]ailing to redraw the school district lines does not seem to me to be 'redrawing school district lines'" (Supplemental Appendix, p. A31, n. 7), and the district judge agreed in his 1979 opinion. (Joint Appendix, p. 109) Be that as it may, failing to redraw school district lines would be a constitutional violation only if the General Assembly of Indiana had an affirmative constitutional duty to expand the boundaries of IPS, the only dual-school system in the county, to include the territory of the other ten unitary school systems once it decided to reorganize civil government in the county so that IPS could have desegregated its schools by spreading its black school population throughout the area of the county. (Joint Appendix, pp. A64-A65) But the existence of such an affirmative constitutional duty was rejected by this Court in *Spencer v. Kugler*, 404 U.S. 1027 (1972), *affirming* 326 F. Supp. 1235 (D.N.J. 1971).

With respect to factor [3], there has been no finding that the suburban Marion County school districts committed acts that effected segregation within IPS. Among the issues of fact considered by the district court in its 1973 opinion was whether or not any of the suburban Marion County school corporations had acted to promote segregation either within IPS or within their own boundaries. (IPS Appendix, p. 16a) The court found that there was no evidence that any of them had committed acts of *de jure* segregation directed against Negro students living within their respective borders. (*Ibid.*, p. 29a) Although the court noted that the suburban Marion County school districts had resisted countywide consolidation when it was proposed in 1960, the court conceded their right to do so under existing law. (*Ibid.*, p. 30a) Toward the end of the opinion, the court observed that it "was pleased to learn from the evidence of the recognition giving to Negro students by their fellow white students in the few suburban schools which they attended, and of the honors, both scholastic and otherwise, which such Negro students have earned in such schools." (*Ibid.*, p. 43a) Included in such evidence was the fact that during the 1971-72 school year at petitioner Perry's Southport High School a black girl had been elected home-coming queen by the student body.

Although the suburban Marion County school districts committed no acts that effected segregation within IPS, the courts below held that the action of respondents The Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating all public housing projects within the boundaries of the Indianapolis Public Schools, without any discriminatory action by the school authorities, was a constitutional violation requiring remedial action by an interdistrict school desegregation decree. While respondents IPS and United States concede that this precise question was expressly left undecided in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23 (1971),

they, nevertheless, argue that the Court should not decide it in this case for various specious reasons. It is highly significant that not one of the respondents opposing Perry's petition for certiorari mentions the discussion in the petition (pp. 19-20) to the effect that the remedy most closely tailored to fit the constitutional violation would have been a remedial decree against the authority and the commission directing them, in accordance with *Hills v. Gautreaux*, 425 U.S. 284 (1976), to locate public housing in the authority's area of operation lying outside the boundaries of IPS, whereas the remedy approved by the courts below impermissibly restructures and displaces the authority of school districts that have not been implicated in the constitutional violation.

In sum, this case, contrary to the contentions of the respondents opposing certiorari, presents for review far more than purely factual matters. As stated in *Milliken*, 418 U.S. at 746, the constitutional right of the black pupils represented by the respondents Buckley is to attend a unitary school system in IPS. The interdistrict remedy ordered by the district court and approved by the court of appeals "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Ibid.*, at 747. This case surely merits review so that this Court can examine the constitutional standards applied by the courts below.

Additionally, as already stated, a very obvious and exceptional showing of error can be made in the findings, approved by the court of appeals, that the actions of the Indiana General Assembly—in failing to expand the boundaries of IPS to the county limits when in 1969 it reorganized and consolidated various but not all city and county civil governmental functions in Marion County—and of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County—in locating all public housing projects within the

boundaries of IPS—were done, at least in part, with a racially discriminatory intent and purpose. The three dissenting opinions of Circuit Judge Tone amply demonstrate such error. (Joint Appendix, pp. A28-A53, A81-A83; Supplemental Appendix, pp. A26-A35)

The basic difficulty with this case is that the courts below have ignored the controlling principle "that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken, supra,* 418 U.S. at 744. The nature and extent of the constitutional violation necessarily must be determined first before a remedy of proper scope can be fashioned. But as observed by Judge Tone (Joint Appendix, pp. A29-A30), the reason why this case has had such a checkered history and pended for so many years is that the district court, ignoring the controlling principle, first settled on an interdistrict remedy for the *de jure* segregation in IPS and then commenced a search for a constitutional violation to support it. Consequently, in this case the nature and extent of the constitutional violation has been determined by the scope of the remedy previously selected.

Respectfully submitted,

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